

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1461

To be argued by
ROBERT N. SHWARTZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1461

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROLAND SMITH,

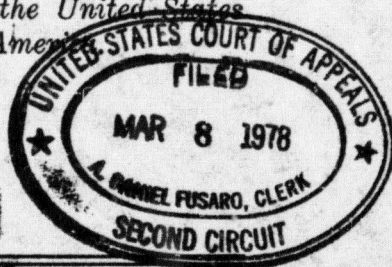
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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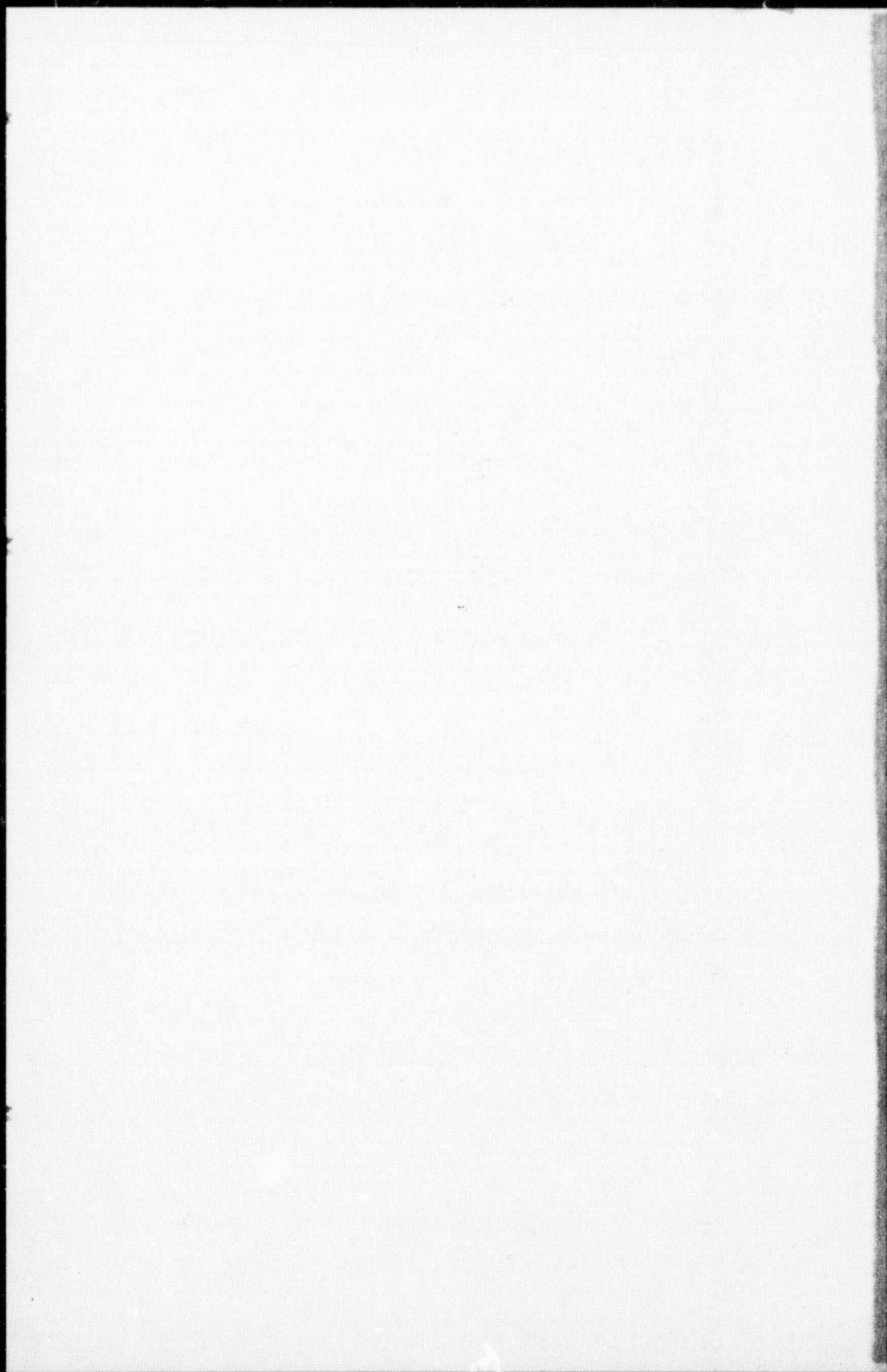


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	3
The Government's Case	3
The Defense Case	5
ARGUMENT:	
POINT I—The Defendant's Confession Was Properly Admitted Into Evidence	5
A. The Suppression Hearing	6
B. The Defendant's Appearance Before the Magistrate Within Five Hours of His Arrest Was Not Unreasonable	7
C. Both the Defendant and His Grandmother Understood the Nature of the Charges and His Rights	12
D. Statements Made Prior To, But Not In Con- nection With, the Transfer Hearing are Admissible	13
E. Smith's Confession Was Voluntary	17
POINT II—The Sentence on Count Two Should be Vacated	20
CONCLUSION	20

TABLE OF CASES

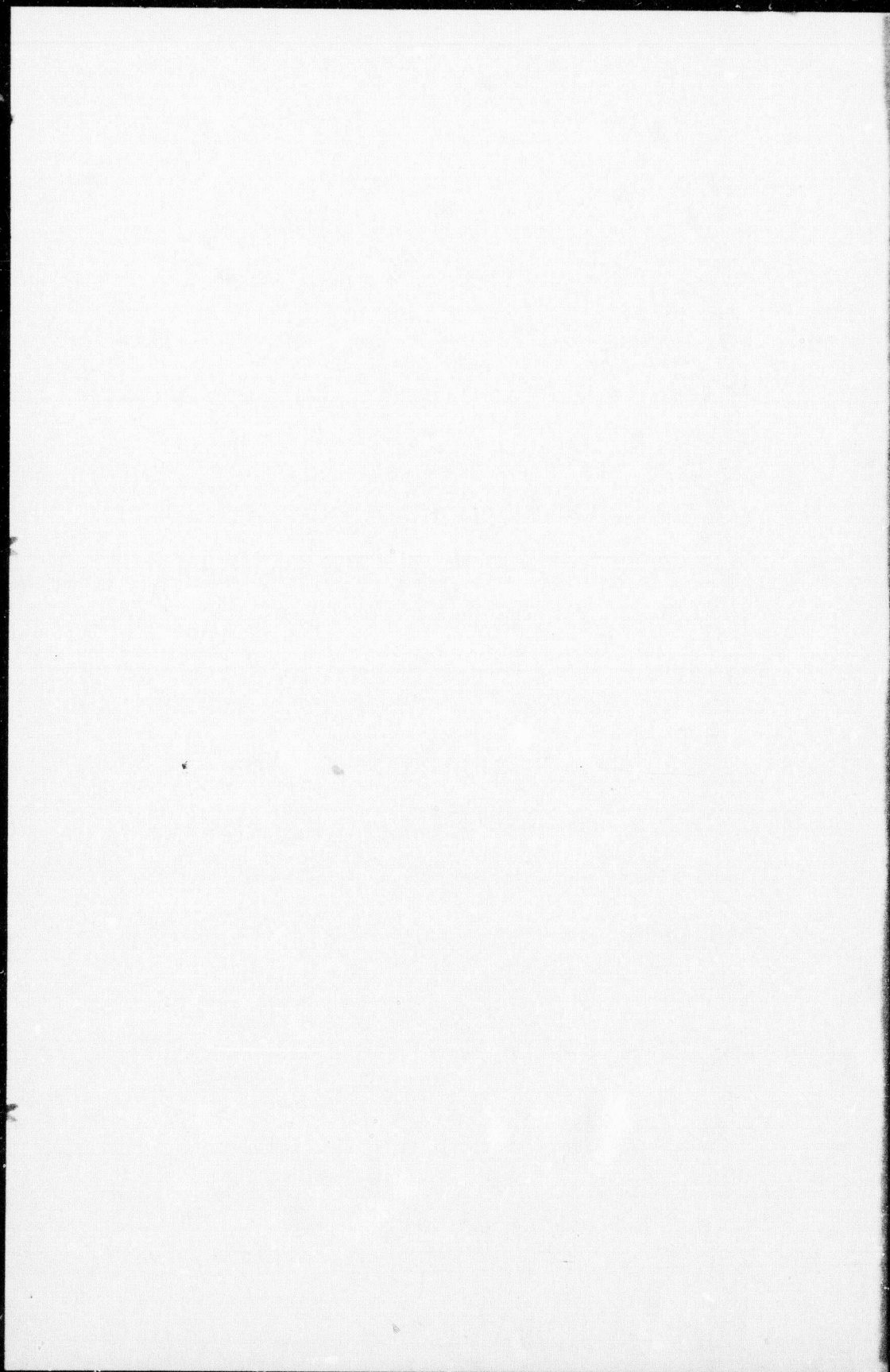
<i>Boulden v. Holman</i> , 394 U.S. 478 (1969)	17
<i>Davis v. North Carolina</i> , 384 U.S. 737 (1966)	17

	PAGE
<i>Gallegos v. Colorado</i> , 370 U.S. 49 (1962)	18
<i>Gorman v. United States</i> , 456 F.2d 1258 (2d Cir. 1972)	20
<i>Haley v. Ohio</i> , 332 U.S. 596 (1948)	18
<i>Harling v. United States</i> , 295 F.2d 161 (D.C. Cir. 1961) (en banc)	14, 15
<i>Harrison v. United States</i> , 359 F.2d 214 (D.C. Cir. 1965) (en banc)	14, 15
<i>Haynes v. Washington</i> , 373 U.S. 503 (1963)	18
<i>Jennings v. Casseles</i> , Dkt. No. 77-2064, slip op. 311, 317 (2d Cir. November 10, 1977)	17
<i>Spano v. New York</i> , 360 U.S. 315 (1959)	18
<i>United States v. Binet</i> , 442 F.2d 296 (2d Cir. 1971)	9, 10, 11, 12
<i>United States v. Cheyenne</i> , 558 F.2d 902 (8th Cir. 1977), <i>affirming</i> , 420 F. Supp. 960 (D.S.D. 1976)	14, 17
<i>United States v. Collins</i> , 462 F.2d 792 (2d Cir.), <i>cert. denied</i> , 409 U.S. 988 (1972)	11
<i>United States v. DeMarce</i> , 513 F.2d 755 (8th Cir. 1975)	10
<i>United States v. Duvall</i> , 537 F.2d 15 (2d Cir.), <i>cert. denied</i> , 426 U.S. 950 (1976)	19
<i>United States v. Friedman</i> , 558 F.2d 1125 (2d Cir. 1977)	19
<i>United States v. Glover</i> , 372 F.2d 43 (2d Cir. 1967)	9, 10, 11, 12
<i>United States v. Hall</i> , 348 F.2d 837 (2d Cir.), <i>cert. denied</i> , 382 U.S. 947 (1965)	9
<i>United States v. Indian Boy X</i> , 565 F.2d 585 (9th Cir. 1977)	8, 9, 10

	PAGE
<i>United States v. Lucchetti</i> , 533 F.2d 28 (2d Cir.), cert. denied, 429 U.S. 849 (1976)	19
<i>United States v. Marchand</i> , 564 F.2d 983 (2d Cir. 1977)	3
<i>United States v. Marrero</i> , 450 F.2d 373 (2d Cir. 1971), cert. denied, 405 U.S. 933 (1972)	11
<i>United States v. Oliver</i> , 523 F.2d 253 (2d Cir. 1975)	20
<i>United States v. Ortega</i> , 471 F.2d 1350 (2d Cir. 1972), cert. denied, 411 U.S. 948 (1973)	11
<i>United States v. Pravato</i> , 505 F.2d 703 (2d Cir. 1974)	20
<i>United States v. Spruille</i> , 544 F.2d 303 (7th Cir. 1976)	14, 16, 17
<i>United States v. Stewart</i> , 513 F.2d 957 (2d Cir. 1975)	20

OTHER AUTHORITIES CITED

Title 18, United States Code, Section 2	2
Title 18, United States Code, Section 371	2
Title 18, United States Code, Section 2113	2, 20
Title 18, United States Code, Section 3501 ...	8, 11, 17
Title 18, United States Code, Section 5010(b)	1
Title 18, United States Code, Section 5031.	5, 12, 14, 16
Title 18, United States Code, Section 5032 ...	2, 5, 13, 14, 15, 16
Title 18, United States Code, Section 5033	5, 8, 9, 11, 12, 15, 16
Title 18, United States Code, Section 5035 amended	9
1974 U.S. Code Cong. & Admin. News 5283	10



**United States Court of Appeals
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Docket No. 77-1461

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROLAND SMITH,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Roland Smith appeals from a judgment of conviction entered on September 6, 1977 in the United States District Court for the Southern District of New York after a four-day trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Superseding indictment S77 Cr. 280, filed May 19, 1977, charged Smith and his co-defendants Stanley McDuffie and Ernest Bethea * and co-conspirator Fred Bellamy ** in three counts with conspiracy, bank robbery

* Co-defendants McDuffie and Bethea pleaded guilty to Count 2 of the superseding indictment. McDuffie was sentenced to a term of six years imprisonment on July 25, 1977. Co-defendant Bethea received an indeterminate sentence pursuant to Title 18, United States Code, Section 5010(b) on September 6, 1977.

** Co-conspirator Bellamy entered a plea of guilty to Count 2 of Indictment 77 Cr. 280 and was sentenced to a term of six years' imprisonment on November 21, 1977.

and armed bank robbery in violation of Title 18, United States Code, Sections 371, 2113(a) & (d) and 2.

At the time of the offense, March 30, 1977, Roland Smith was seventeen years old.* Smith was arrested on April 7, 1977. On April 26th the United States Attorney for the Southern District of New York, pursuant to Title 18, United States Code, Section 5032 and his authority delegated by Order of the Attorney General of the United States, No. 579-74, dated October 16, 1974, 39 Fed. Reg. 37771, and after investigation, certified that the juvenile court or other appropriate courts of the State of New York refuses to assert jurisdiction over Roland Smith and further that such courts do not have available programs and services adequate for the needs of juveniles.

On May 12, 1977 a transfer hearing was conducted before the Honorable Charles L. Brieant, Jr., pursuant to Title 18, United States Code, Section 5032. After hearing the evidence Judge Brieant announced his findings from the bench. He concluded that Smith's transfer to adult status would be in the interests of justice. (H. 81-92). On May 19, 1977 superseding indictment S77 Cr. 280 was filed naming Smith, Bethea and McDuffie as defendants.**

* Smith was born on September 15, 1959. (H. 81). References to the transfer hearing transcript are abbreviated herein as "H.", the trial transcript as "Tr.", the Government's trial exhibits as "GX", the defendant's trial exhibits as "DX", the Court's exhibits as "CX", Smith's brief as "Br.", and Smith's appendix as "App.". References to the suppression hearing transcript, which are separately paginated for each day are abbreviated herein as "S.I.", "S.II" and "S.III" for the hearing on June 15, 16 and 20, 1977, respectively.

** Bellamy, who had already pleaded guilty to Count 2 of the original indictment, was named as an unindicted co-conspirator in the superseding indictment.

On July 19, 1977 the jury returned a verdict of guilty on all three counts. On September 6, 1977, Smith was sentenced to concurrent term of five years' imprisonment on Count One and eight years' imprisonment on Counts Two and Three.

Smith is presently serving his sentence.

Statement of Facts

The Government's Case

The evidence overwhelmingly established that Roland Smith was one of four persons who planned and executed the armed robbery of the National Bank of North America at 200 Lexington Avenue, New York, New York, on March 30, 1977. Smith, Bellamy and McDuffie entered the bank. While Bellamy controlled the floor with a sawed-off shotgun Smith and McDuffie jumped over the tellers' counter to collect the cash. Meanwhile Bethea waited outside to hail a taxi for their getaway. Smith's participation in the bank robbery was directly established by the testimony of Bellamy and McDuffie, by the bank surveillance photographs (GX 1 & 7) and by Smith's own admissions.*

* The testimony of Bellamy and McDuffie fully corroborated each other, both as to their own respective roles and as to the defendant's role. Smith all but concedes this point.

The Government offered a collection of 62 bank surveillance photographs (GX 1) and a sub-set of blow-ups focusing on Smith. (GX 7). While one bank robber wore sunglasses and a longshoreman's cap pulled down over his forehead the similarity with the defendant remained striking.

The so-called confusion that Smith points to (Br. 12-14) in McDuffie's testimony about who robbed the bank with him and who appears in the surveillance photographs is better explained by an accomplice's "unwillingness" rather than his "inability" to identify the defendant, such as described by Judge Friendly in *United States v. Marchand*, 564 F.2d 983, 985 (2d Cir. 1977). McDuffie, who had already pleaded guilty, testified against Smith only after receiving immunity. (Tr. 71).

A few days before the bank robbery Fred Bellamy met with Stanley McDuffie in Brooklyn to discuss the plans to rob a bank. (Tr. 89-95, 152-53). The night before the bank robbery McDuffie introduced Bellamy to Smith to discuss getting some guns and a car for the bank robbery. (Tr. 153-55). McDuffie later introduced Bellamy to Bethea. (Tr. 155-58).

The next morning Bellamy, McDuffie, Smith and Bethea met on Myrtle Avenue in Brooklyn. The four conspirators drove into Manhattan in a stolen car. (Tr. 98-107, 158-61). They headed for a bank on 21st Street which Bellamy had robbed previously. They decided not to rob the 21st Street bank because there were too many police in the area. A few blocks further uptown the stolen car broke down. Smith and his three confederates abandoned the car and continued walking uptown until they came upon the National Bank of North America at 200 Lexington Avenue. (Tr. 107-10, 165-68).

After Bellamy and McDuffie cased the bank, Bellamy, McDuffie and Smith entered the bank. Bethea waited outside the bank to hail a cab. Bellamy pulled a sawed-off shotgun out from under his coat and instructed everyone to get down on the floor. McDuffie and Smith jumped over the tellers' counter and gathered up the money from the open cash drawers. (Tr. 110-114, 168-69, 174-77). McDuffie slapped a teller. After collecting the cash McDuffie, Smith and Bellamy left the bank. (Tr. 27-33, 42-51, 69-3-69-9, 69-12, 69-16-69-18). Once outside, Smith, McDuffie and Bellamy joined Bethea in the waiting cab and returned to Brooklyn. At McDuffie's apartment they split up the cash. Smith, McDuffie and Bellamy receiving equal shares of just over \$3000 each, while Bethea received approximately \$1000. (Tr. 122, 177-79).

The Defense Case

The defendant called Federal Bureau of Investigation Special Agent Henry Garcia. Special Agent Garcia testified that latent fingerprints, found at the bank on the day of the robbery, were not identifiable as the defendant Smith's. (Tr. 275-79, 282-83).

A R G U M E N T

POINT I

The Defendant's Confession Was Properly Admitted Into Evidence.

The defendant sets forth four related grounds to support his claim that his post-arrest admissions should have been suppressed. The first three of these stem from alleged violations of his rights under the Juvenile Delinquency Act, 18 U.S.C. § 5031, *et seq.* Smith contends that the five hour interval between his arrest and his initial appearance before the magistrate was unreasonable and contrary to the Juvenile Delinquency Act, 18 U.S.C. § 5033. Next, Smith suggests that he was denied an opportunity to confer with his grandmother and legal guardian, and further that the police failed to determine whether the grandmother understood the defendant's rights. The defendant also contends that the suppression of his statements was required as a statement made prior to a transfer hearing pursuant to 18 U.S.C. § 5032. Finally, Smith claims that his statement was involuntary and coerced. The record in this case and Judge Cannella's specific findings of fact demonstrate that each of these contentions is without merit.

A. The Suppression Hearing

After conducting a three day suppression hearing, Judge Cannella found the following to have been the facts surrounding the defendant's arrest and subsequent statements to Assistant United States Attorney John Flannery on April 7, 1977. (App. D, pp. 1-4). Smith was arrested by New York Police Detectives William Carbone and James Fox at the home of his grandmother, Ida Brown at approximately 10:15 a.m. Detective Carbone, in the presence of the defendant's grandmother, advised him of the nature of the charges and his constitutional rights. The defendant indicated he understood. Neither the defendant nor his grandmother made any requests. (S.II 3-6, 10). Before taking Smith to the local precinct house in Brooklyn, Detective Carbone told Mrs. Brown where her grandson was going and volunteered his telephone number if she should have any questions. (S.II 6).

At the 84th Precinct in Brooklyn F.B.I. Special Agents Raymond Bernard and Marlin Vogt placed the defendant in federal custody between approximately 10:30 and 10:45. Agent Bernard introduced himself, told Smith the nature of the charges and advised him of his rights. The defendant again indicated that he understood his rights and made no request to see an attorney or his guardian. (S.I. 8, S.II 7).

Because Smith was believed to be under eighteen years of age the F.B.I. departed from its usual practice of taking an arrestee directly to F.B.I. headquarters for processing prior to the U.S. Attorney's Office. Instead Smith was taken directly to the U.S. Attorney's Office. This was done in this case to reduce the time before Smith would be able to appear before a magistrate. (S.III 33). On the way over from Brooklyn Agent Bernard read Smith his rights again. Smith arrived at the U.S. Attorney's Office at approximately 11 o'clock. (S.I 9, 21-22).

Smith was interviewed by a Pretrial Services Officer and processed by the Marshall's Office. At approximately 1:45 p.m. Assistant United States Attorney Flannery began his interview of the defendant. Before speaking with Smith, Flannery reviewed the Juvenile Delinquency Act, familiarized himself with the facts in the case, spoke with a representative of the Manhattan District Attorney's Office and learned that the State would decline prosecution of Smith and made arrangements for Probation Officer Thomas Eich to be present at his interview. (S.I. 22-24, S.III 19-21, 34).

At the time of Flannery's interview of the defendant the identity and whereabouts of the fourth bank robber were unknown. In addition the sawed-off shotgun used in the robbery and almost all of the stolen cash were still missing. (S.III 24).

At the outset of the interview Flannery introduced the persons present and advised the defendant of his rights for the fourth time since his arrest three and a half hours earlier. He again indicated he understood his rights, did not request an attorney and agreed to answer questions.* During that forty minute interview Smith admitted participating in the instant bank robbery and receiving a share of the proceeds. (S.I. 22-30, S.III 20-23, 30).

B. The Defendant's Appearance Before the Magistrate Within Five Hours of His Arrest Was Not Unreasonable

The defendant's first contention is that he was detained for an unreasonable period of time from his arrest at approximately 10:15 a.m. until his appearance before

* Pretrial Services Officer Arthur Rucks testified that the defendant seemed to understand what was happening, was "street-wise" and had considerable familiarity with his rights based on his numerous prior encounters with the law. (S.III 43-46).

a magistrate at 3:00 p.m., contrary to the applicable provision of 18 U.S.C. § 5033.* He therefore argues that his post-arrest statements made to an Assistant United States Attorney must be suppressed. Judge Cannella correctly found that the Government fully complied with this provision, and there was no need to suppress Smith's confession.

The Government demonstrated and Judge Cannella found that "the five-hour delay before Smith was brought before a magistrate was shown to have been reasonable under the circumstances" and that "the forty-minute interview . . . was necessary both for bail purposes and to aid in the apprehension of the fourth bank robber." ** (App. D, pp. 10-11). Indeed the Government was able to account for almost every minute of that time.

Smith was arrested in the presence of his legal guardian at 10:15 a.m., and turned over to the FBI by the police at approximately 10:30 a.m. The FBI did not follow the agency's normal practice of processing the arrestee at FBI headquarters, but instead took Smith directly to the United States Attorney's Office. Once at the United States Attorney's Office he was interviewed by a Pretrial Services Officer and processed by the Marshal's Office. The Assistant United States Attorney

* Section 5033 states, in relevant part:

"The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate."

** While the mere passage of sufficient time might justify a finding of unreasonable delay, statements made within six hours of arrest have the imprimatur of reasonableness. Cf. 18 U.S.C. § 3501(c). For this purpose it is noteworthy that Smith gave his statement three and a half to four hours after his arrest. *United States v. Indian Boy X*, 565 F.2d 585, 587 n.2 (9th Cir. 1977).

reviewed the Juvenile Delinquency Act, spoke with state representatives who stated the State would not prosecute Smith, and arranged for a probation officer—hardly a representative of the prosecution—to be present at the Assistant's interview of Smith. Finally, the interview by the Assistant United States Attorney was justifiably motivated by a need to investigate and determine as quickly as possible the whereabouts of the fourth bank robber, the sawed-off shotgun and the stolen money as well as for bail purposes.*

Since the five-hour delay from arrest to arraignment was reasonable, this case stands in marked contrast to those relied on by the defendant to support his claim that the five-hour delay violated the command of Section 5033—*United States v. Binet*, 442 F.2d 296 (2d Cir. 1971) and *United States v. Glover*, 372 F.2d 43 (2d Cir. 1967). Both cases, as the defendant concedes, were decided under the predecessor statute of § 5033. Former Section 5035 ** contains a "forthwith" requirement similar to the present

* This Court has recognized that such an investigatory purpose justifies questioning by the Government of the defendant. *United States v. Binet*, 442 F.2d 296, 299-300 (2d Cir. 1971); see also *United States v. Indian Boy X*, *supra*, at 590; *United States v. Hall*, 348 F.2d 837, 842-43 (2d Cir.), *cert. denied*, 382 U.S. 947 (1965).

** Former Section 5035, Title 18, United States Code, states in relevant part:

"If the juvenile is not forthwith taken before a committing magistrate, he may be detained in such juvenile home or other suitable place of detention as the Attorney General may designate for such purposes, but shall not be detained in a jail or similar place of detention unless, in the opinion of the arresting officer, such detention is necessary to secure the custody of the juvenile, or to insure his safety or that of others.

In no case shall such detention be for a longer period than is necessary to produce the juvenile before a committing magistrate."

section 5033. The former statute, however, under which *Binet* and *Glover* were decided, prohibited all "unnecessary" delays while the present provision bars only "unreasonable" delays. *United States v. Indian Boy X*, 565 F.2d 585, 590 (9th Cir. 1977). The legislative history does not indicate the significance of this shift in language, 1974 U.S. Code Cong. & Admin. News 5283, 5320, although the language itself certainly does not indicate that a sterner test is now in effect.

The facts and circumstances in the *Binet* and *Glover* cases support Judge Cannella's conclusion that there was no unreasonable delay in this case. In *Binet*, over eight hours elapsed from arrest to arraignment of the juvenile. Half of that delay was completely unexplained, while in the instant case almost the entire five-hour delay was explained. Unlike the situation with Smith, the defendant in *Binet* was first interviewed by postal agents and had to receive an injection of methadone before he was brought to the United States Attorney's Office. Furthermore, in *Binet* this Court recognized that there was no investigatory need to question the juvenile since all of his confederates had been caught red-handed and the stolen property recovered. The sole purpose for questioning the juvenile in *Binet* was to secure a confession. *United States v. Binet*, *supra* at 299-300. In Smith's case there were sound investigatory reasons to justify the questioning of Smith.

In *Glover* the juvenile was held for over 16 hours before being presented to a magistrate and had been lodged overnight at the Federal House of Detention. After spending the night in jail the juvenile was questioned by postal agents and admitted participation in the crime. See also *United States v. DeMarce*, 513 F.2d 755 (8th Cir. 1975) (eighty-hour delay). In the instant case Smith's statements were made approximately four hours after his arrest, and Smith had not spent any time in a prison facility.

Moreover, Judge Cannella properly observed that since Smith had been transferred to adult status he was in a category separate from the defendants in *Binet* and *Glover* who were prosecuted as juveniles and not as adults. In this case, Judge Brieant, after conducting a hearing and weighing such factors as Smith's age, social background, intellectual development and psychological maturity, concluded that Smith should be treated as an adult. Thus, Judge Cannella concluded that in such circumstances "the depth of protection extended" by the Act need not be as great (App. D, p. 10) as the protections afforded the defendants *Binet* and *Glover* who were treated only as juveniles.* This result is mandated by a consideration of one of the underlying policies of the Act—that certain juveniles despite their age should be treated as adults for criminal law purposes in view of the seriousness of the charge, their prior criminal record,** their background, and because the interests of justice so require. Once the propriety of treating the particular juvenile as an adult has been determined at the transfer hearing, the reason for the special procedural safeguards set forth in Section

* Under 18 U.S.C. §3501(c) and the precedent in this Circuit the five-hour delay in this case simply was not unnecessary nor unreasonable. See *United States v. Ortega*, 471 F.2d 1350, 1362 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973); *United States v. Collins*, 462 F.2d 792 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972); *United States v. Marrero*, 450 F.2d 373 (2d Cir. 1971), *cert. denied*, 4054 S. 933 (1972).

** Judge Brieant found Smith's experience with law enforcement officers to extend back to when he was ten years old. (H. 81, 87). Various juvenile delinquency charges were made from that time on relating to assorted robberies, larcenies and assaults. Smith was placed on juvenile probation in 1974 for threatening to kill and rob a 73 year old man. (H. 88). He received a criminal court probation sentence in 1975 for a petty larceny offense in connection with a robbery of a taxi driver. In 1976 he was convicted as an adult in Kings County Supreme Court, of attempted grand larceny relating an attempt to rob a retired police officer. He was sentenced to one year's imprisonment. (H. 53-54, 89).

5033 are no longer applicable or justified by the defendant's age alone. Indeed once the juvenile has been transferred to adult status and no longer enjoys the substantial benefits of juvenile status, 18 U.S.C. §§ 5031, *et. seq.*, there is no reason to provide him with the special evidentiary protection recognized by this Court in *Binet* and *Glover*.

C. Both the Defendant and His Grandmother Understood the Nature of the Charges and His Rights

The defendant claims that his confession must be suppressed because the arresting officer failed to ascertain if Mrs. Brown, the defendant's legal guardian, understood the *Miranda* warnings and because the defendant was not allowed to confer with his grandmother. There is not a scintilla of evidence in the record to support these claims.*

Section 5033 provides, in relevant part:

Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such arrest. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

The record is clear that Detective Carbone advised both the defendant and his grandmother of the nature of the charges and his rights. Mrs. Brown was present at

* Neither the defendant nor his grandmother testified at the suppression hearing.

the time of the arrest. Carbone told both Smith and his grandmother to "listen very carefully" (S.III 4) as he explained Smith's rights. Neither made any requests. Neither asked to speak with the other alone. Mrs. Brown did not ask if she could come with her grandson nor did she instruct the police that they should not question Smith without an attorney or herself present. (S.II 3-6; App. D, pp. 7-8). Detective Carbone volunteered his phone number to Mrs. Brown. Later that day she called asking where Smith was and making no other requests. (S.II 6). Consequently nothing in the record supports Smith's claim that he was prevented from conferring with his legal guardian or that the guardian did not comprehend the *Miranda* warnings.

For the first time on appeal, the defendant argues that "the grandmother was not informed by any of the federal authorities of her grandson's whereabouts. . . ." (Br. 22). It is entirely irrelevant that a federal agent did not advise Mrs. Brown of her grandson's immediate circumstances when it is conceded that New York Police Detective Carbone, the arresting officer, advised her fully at the time of the arrest. Carbone told her where Smith was going, and later told her exactly where he was. (S.II 6). In addition, Pretrial Services Officer Rucks testified that he spoke with the grandmother and told her where her grandson was. The only request she made was that he call her back later to tell her what bail had been set. (S.III 35-36).

D. Statements Made Prior To, But Not In Connection With, the Transfer Hearing are Admissible

Smith contends that all statements made by a juvenile at any time prior to a transfer hearing must be suppressed. In advancing this argument Smith relies on the last sentence of Section 5032, Title 18, United States Code:

Statements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions.

Read in context section 5032 does not require the suppression of Smith's statements simply because they were made some five weeks before the transfer hearing.

The only two reported cases to have construed this provision are in complete accord with Judge Cannella's conclusion that "only those statements made by a juvenile *in connection with* a transfer hearing" are excludable at a subsequent criminal prosecution. (App. D pp. 5-6). *United States v. Spruille*, 544 F.2d 303 (7th Cir. 1976); *United States v. Cheyenne*, 420 F. Supp. 960 (D.S.D. 1976), *aff'd*, 558 F.2d 902 (8th Cir. 1977). The facts in those cases are identical with the facts in the instant case. In each case the juvenile made statements prior, and completely unrelated, to a later transfer hearing. Each juvenile was transferred to adult status. Both Courts of Appeals which have interpreted this last sentence of § 5032 have held that "statements of a juvenile made prior to the transfer hearing are inadmissible only if they are related to or connected with the hearing." *United States v. Cheyenne*, *supra*, at 906. *United States v. Spruille*, *supra*, at 305-07.*

* The cases relied on by Smith interpreting the D.C. Code relating to juvenile delinquency proceedings are distinguishable from the provisions under the Juvenile Delinquency Act of 1974, 18 U.S.C. § 5031, *et seq.* *Harrison v. United States*, 359 F.2d 214 (D.C. Cir. 1965) (en banc); *Harling v. United States*, 295 F.2d 161 (D.C. Cir. 1961) (en banc). The District of Columbia Circuit judicially required that all statements made while a juvenile was under the exclusive jurisdiction of the Juvenile Court were not admissible at a criminal trial if the Juvenile Court subsequently waived its jurisdiction. The basis for this broad exclusionary provision was the Court's recognition that under the then-applicable D.C. Code a juvenile proceeding, as a non-criminal proceeding, lacked the usual criminal procedural safeguards recognized

[Footnote continued on following page]

Any other construction of this provision would be contrary to the legislative history and purposes of the Act. The procedures for a transfer hearing outlined in section 5032 require consideration of such matters as the juvenile's social background, intellectual development and psychological maturity. The provision in question was designed to encourage the juvenile's cooperation and candor in such inquiries. To adopt an automatic exclusionary rule for all statements made before a transfer hearing was conducted would further no purpose of the Act and might well discourage the Government from seeking to transfer a juvenile to adult status in an appropriate case. Furthermore, the defendant's reading of the statute would have the incongruous result that the younger juveniles and those committing less serious offenses would find their statements admissible against them while the more mature juveniles and those involved in the most serious offenses would enjoy an immunity from their own statements.*

Moreover, the placement of this provision in § 5032 rather than § 5033 is further evidence that Congress intended to preclude the use of a juvenile's statements made in connection with the transfer hearing and not to require automatic suppression of any statements made

as necessary for adult criminal defendants. *Harrison v. United States, supra*, at 223-27; *Harling v. United States, supra*, at 162-64. The Juvenile Delinquency Act of 1974 expressly provides juveniles with those very safeguards that were not available for the *Harling* and *Harrison* juveniles. 18 U.S.C. §§ 5032-36. It follows that having received the procedural safeguards as a juvenile that *Harling* and *Harrison* were denied, Smith's voluntary statement should not be excluded simply because it preceded his transfer to adult status.

* Smith's reading of the statute would require that all admissions made by the juvenile during the planning and execution of the crime be suppressed simply because they were statements made prior to the transfer hearing. While the defendant does not urge this point, the logic of his position requires it.

by the juvenile. Section 5032 relates to the treatment of a juvenile who commits a federal crime, and outlines the procedure to be followed in transferring a juvenile to adult status. Section 5033 concerns the procedure to be followed before taking a defendant before the magistrate for arraignment. The placement of the disputed language that statements made prior to a transfer hearing are not admissible at a criminal prosecution in section 5032 is evidence that Congress was referring to statements made in connection with transfer from juvenile to adult status. If Congress intended to preclude the admission of any post arrest, pre-arraignment statement, the logical place to include such a provision would have been within § 5033, the section relating to the procedures to be followed prior to the appearance of the juvenile before the magistrate.

The Seventh Circuit's decision in *United States v. Spruille*, *supra*, limiting § 5032 to statements made in connection with a transfer hearing was based in part on a review of the legislative history of the Juvenile Delinquency Act, 18 U.S.C. § 5031 *et seq.*, as amended in 1974. The Seventh Circuit's review of that history revealed that the Act was designed to update criminal procedures for juveniles. The Court found nothing in that history relating to the improper treatment of juveniles in order to secure statements or any evidence that Congress believed that a juvenile's statements were unreliable. The legislative history also revealed that the Act was not intended to enact new rules of evidence for juvenile cases, and the Seventh Circuit expressed doubt that Congress would have enacted a broad exclusionary rule "without some consideration by the legislature of the need and justification for such a significant change." In view of Congress' concern about juvenile crime as reflected in the legislative history, the Seventh Circuit also doubted that Congress would have intended to curtail drastically the usefulness of customary police work ordinarily of value during a trial without any explicit reference in the legis-

lative history.* See *United States v. Spruille*, *supra*, 544 F.2d at 304-06.

E. Smith's Confession was Voluntary

Smith raises a general attack on the voluntariness of his confession. He apparently contends that his confession to an Assistant United States Attorney was not freely given.

A review of the totality of the circumstances surrounding the confession, including the fact that Smith was given his *Miranda* warnings, the nature of the interview, and Smith's prior dealings with the law, unquestionably demonstrates the voluntariness of the confession. *Boulden v. Holman*, 394 U.S. 478 (1969); 18 U.S.C. § 3501. Indeed on this record it is clear that the conduct of the law enforcement officials did not overbear the defendant's will to resist and thus to bring about a confession not freely given. See *Jennings v. Casseles*, Dkt. No. 77-2064, slip op. 311, 317 (2d Cir., November 10, 1977).

The fact that warnings were given is one factor to be considered in determining voluntariness. *Davis v. North Carolina*, 384 U.S. 737, 740-41 (1966). Here the defendant and his grandmother were advised of his right to remain silent and his right to counsel. Indeed, the defendant had his rights explained to him on four separate occasions, indicating he understood each time, before he was asked any questions.

* The Eighth Circuit's opinion in *United States v. Cheyenne*, *supra*, 558 F.2d at 906-07, relies on the Seventh Circuit's opinion in *Spruille* and concludes that Congress did not intend the unreasonable result that all statements made by the juvenile are inadmissible—even those having no connection with the transfer hearing.

The nature and length of the questioning should also be considered in assessing the confession's voluntariness. *Haynes v. Washington*, 373 U.S. 503, 514-15 (1963); *Spano v. New York*, 360 U.S. 315 (1959). In Smith's case efforts were made to minimize both the delay before questioning and the questioning itself. The defendant was not interviewed by the FBI agents, and the interview by the Assistant United States Attorney lasted for approximately 45 minutes. Moreover, that interview was conducted in the presence of a probation officer—a neutral party. Any argument that such an interview was coercive must be rejected.*

The age and intelligence of the defendant is another fact to be considered on the question of voluntariness. *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948). The relative youth of a defendant does not, of course, render a confession *per se* coerced. Here Judge Brieant's conclusions as to the propriety of Smith's transfer to adult status deserve considerable weight. (H. 81-92). The inference of low intelligence to be drawn from an old I.Q. score, upon which appellant so heavily relies, was considered and rejected by several witnesses and Judge Brieant at the transfer hearing. The Court found Smith to be of at least average intellectual potential. (H. 82-83).

A final factor to be considered is the defendant's extensive familiarity with the criminal justice system and

* Contrary to the suggestion in defendant's brief (Br. 21), Smith's grandmother was never prevented from speaking or being with the defendant. *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962). The record is clear that Mrs. Brown was kept fully apprised of her grandson's status by the commendable efforts of Detective Carbone and the phone call by Pretrial Services Officer Rucks. Mrs. Brown simply never expressed any desire to see her grandson or to be present for questioning. Nor did Smith ever ask to speak to his guardian.

his generally "streetwise" disposition. (S. III p. 46). Here the Pretrial Service Officer, Mr. Rucks—another neutral party who had interviewed Smith before the arraignment—testified that Smith was "streetwise" and had considerable familiarity with his constitutional rights. (S. III 43-46).

Citing *United States v. Duvall*, 537 F.2d 15, 23-25 (2d Cir.), *cert. denied*, 426 U.S. 950 (1976), the defendant claims that the confession must be suppressed because he was pressured to waive his rights by the prosecutor's advising him that he faced a possible 20-year sentence. In *Duvall*, a defendant was told that he faced a possible 100 year sentence in a case involving possession of stolen mail and uttering United States treasury checks with forged endorsements. The Assistant United States Attorney here followed *Duvall's* guidelines and did not exaggerate Smith's potential sentence. The facts in this case and the eight year sentence ultimately imposed by Judge Cannella bear out the accuracy as well as the good faith of the prosecutor's remark that the defendant had been arrested for a serious offense with a substantial potential penalty. Taken in context, where the defendant never testified that such a remark was ever made, much less that it pressured him to speak, this remark had no bearing on the voluntariness of the defendant's statements.

Moreover, in *Duvall* the defendant had been arrested 20 hours before his interview by an Assistant United States Attorney, had been interrogated previously by Secret Service agents, and had been lodged overnight in jail. In the instant case where the defendant was given his rights on several occasions, arrested at 10:15 a.m., and about three and one-half hours later was interviewed by the Assistant United States Attorney in the presence of a probation officer, there is simply no basis to conclude that Smith's statements were not voluntarily given. See also *United States v. Friedman*, 558 F.2d 1125, 1126 (2d Cir. 1977); *United States v. Lucchetti*, 533 F.2d 28, 36 (2d Cir.), *cert. denied*, 429 U.S. 849 (1976).

POINT II**The Sentence on Count Two Should be Vacated.**

Judge Cannella imposed concurrent sentences of eight years on Counts Two and Three, charging violations of 18 U.S.C. § 2113(a) & (d), respectively. Since these counts both relate to the same bank robbery, the sentence on Count Two, the lesser-included offense, should be vacated. *United States v. Oliver*, 523 F.2d 253, 260 (2d Cir. 1975); *United States v. Stewart*, 513 F.2d 957, 960-61 (2d Cir. 1975); *United States v. Pravato*, 505 F.2d 703, 705 (2d Cir. 1974); *Gorman v. United States*, 456 F.2d 1258 (2d Cir. 1972).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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